



6-1-2014

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Recommended Citation

Kristie Xian, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 632 (2014).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol28/iss2/8>

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THE PRICE OF JUSTICE: DEFERRED PROSECUTION AGREEMENTS IN THE CONTEXT OF IRANIAN SANCTIONS

KRISTIE XIAN*

“The sense of public justice in the community at large is offended and every rogue, on the contrary, is encouraged, if punishment be not adequate and certain.”¹

INTRODUCTION

Peter Sands was sweating. It was August 2012, and the multi-billion dollar London-based conglomerate Standard Chartered Bank had just been accused of violating Iranian sanctions under Sands’s watch as CEO. Sands was accused of trashing his company’s sterling reputation by engaging in shady transactions with Iran, which has been under U.S. economic sanctions since 1979.² Not only was Standard Chartered accused of using its New York branch to facilitate numerous international transactions between itself and the Iranian government, its executives were also accused of participating in a broad cover-up scheme and lying to investigators about making the transactions.³ The charges alleged that Standard Chartered hid 60,000 secret transactions in Iranian funds worth a staggering \$250 billion.⁴ The bank’s initial reaction to these charges was not as elegant as shareholders might have hoped: finance director Richard Meddings, who was accused of showing “obvious contempt for US banking relations,” blasted back, “You f—— Americans. Who are you to tell us, the rest of the world, that we’re not

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1. Simeon E. Baldwin, *The Fundamental Principles of Criminal Justice*, 22 YALE L.J. 30, 35 (1912). Baldwin was a jurist, law professor, and served as the sixty-fifth Governor of Connecticut.

2. *Iran Sanctions*, U.S. DEP’T OF STATE, <http://www.state.gov/e/eb/tfs/spi/iran/index.htm> (last visited Apr. 29, 2014).

3. Yuki Noguchi, *Why Evasion U.S. Rules May Tempt Foreign Banks* (National Public Radio broadcast Aug. 10, 2012), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=158507406>.

4. Dan Fitzpatrick & Robin Sidel, *New J.P. Morgan Jam*, WALL ST. J., Nov. 16, 2012, at C1. At the time the transactions occurred, Iranian financial institutions were subject to U.S. economic sanctions. Later, the list of sanctioned countries involved in the allegations expanded to include Libya, Myanmar, and Sudan. See *Too Big to Jail: Two Big British Banks Reach Controversial Settlements*, ECONOMIST, Dec. 12, 2012.

going to deal with Iranians.”⁵ Subsequently, Standard Chartered’s stock plummeted sixteen percent in London trading.⁶ The most alarming revelation was that Standard Chartered might lose its New York license, which analysts predicted would lead to a devastating forty percent drop in earnings.⁷

But Sands had many on his side. U.K. officials supported Standard Chartered’s denials, and the charges even prompted the Mayor of London, Boris Johnson, to seethe, “[Y]ou can’t help thinking [these charges] might actually be at least partly motivated by jealousy of London’s financial sector—a simple desire to knock a rival centre.”⁸ Bank of England Governor Mervyn King criticized Benjamin Lawsky, a New York Department of Financial Services regulator and leader in charges against Standard Chartered, for failing to coordinate with his counterparts.⁹ In actuality, those counterparts were quietly gathering their legal weaponry for a standoff against Lawsky himself, rather than Standard Chartered. The Federal Reserve, the U.S. Treasury Department, the Justice Department, and the Manhattan District Attorney’s Office all understood that they would “have to work this [scandal] out at [the] international level”¹⁰ and complained in published reports that the original order was a “publicity stunt that disrupted their own probes of the matter.”¹¹

The subsequent trajectory of events unraveled in a way that surprised even U.S. regulators’ most vocal supporters. Standard Chartered Bank settled charges with both New York State and the U.S. government regarding its illegal transactions with Iran.¹² Astonishingly, the

5. Lawsky’s ‘Go it Alone’ Attack on Standard Chartered Angers US Regulators, DAILY TELEGRAPH (UK) (Aug. 8, 2012), <http://www.telegraph.co.uk/finance/newsbysector/bank-and-finance/9460830/Lawskys-go-it-alone-attack-on-Standard-Chartered-angers-US-regulators.html>.

6. Gavin Finch & Howard Mustoe, *Standard Chartered CEO Says “No Grounds” to Revoke License*, BLOOMBERG NEWS (Aug. 9, 2012), <http://www.bloomberg.com/news/2012-08-08/standard-chartered-ceo-sands-rejects-n-y-regulator-s-claims-1-.html>.

7. Greg Farrell & Tiffany Kary, *Standard Chartered Still Faces Fed Probes After N.Y. Deal*, BLOOMBERG NEWS (Aug. 15, 2012), <http://www.bloomberg.com/news/2012-08-14/standard-chartered-faces-fed-probes-after-n-y-deal.html>.

8. Mayor Johnson also haughtily contended that the charges were politically motivated, writing in the same opinion piece for London-based *Spectator* magazine, “[Y]ou can’t help wondering whether all this beating up of British banks and bankers is starting to shade into protectionism.” See Boris Johnson, *Diary*, SPECTATOR (UK) (Aug. 11, 2012), <http://www.spectator.co.uk/the-week/diary/123450/diary-503/>. For discussion of how heads of corporations and their attitudes can affect a company’s propensity to engage in white collar crime, see generally Cynthia A. Koller, Laura A. Patterson & Elizabeth B. Scalf, *When Moral Reasoning and Ethics Training Fail: Reducing White Collar Crime Through the Control of Opportunities for Deviance*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 549, 570 (2014).

9. Finch & Mustoe, *supra* note 6.

10. *Id.*

11. Farrell & Kary, *supra* note 7.

12. Jim Zarroli, *British Bank Settles Money Laundering Charges* (National Public Radio Broadcast Aug. 15, 2012), available at <http://www.npr.org/2012/08/15/158818409/standard-chartered-settles-money-laundering-charges>.

bank only ended up paying a fine of \$240 million.¹³ Later, Standard Chartered paid an additional \$327 million.¹⁴ Its fees totaled \$667 million—only 2.5% of the transactions involving Iranian funds.¹⁵ Moreover, Standard Chartered was not banned from trading in the United States. In fact, no individual bank official has been criminally charged for wrongdoing to date.¹⁶ Instead, U.S. regulators chose the lenient path of deferred prosecution agreements to incentivize the bank to abide by the sanctions.¹⁷

Standard Chartered was not the first international financial institution to be accused or charged of money laundering and engaging in illegal transactions. Since 2009, Credit Suisse,¹⁸ Royal Bank of Scotland,¹⁹ Lloyds TSB Group,²⁰ Barclays, ING Bank,²¹ ABN Amro,²² and HSBC²³ have all agreed to pay enormous settlements to the U.S. government for facilitating illicit financial transfers on behalf of countries ranging from Iran to Cuba, all of which are subject to U.S. economic

13. *Id.* The amount that Standard Chartered profited from other illegal transactions, including those with Libya, Myanmar, and Sudan, remains unreported.

14. *Id.*

15. *Id.*

16. Farrell & Kary, *supra* note 7.

17. Press Release, Bd. of Governors of the Fed. Reserve Sys. (Dec. 10 2012), <http://www.federalreserve.gov/newsevents/press/enforcement/20121210a.htm> [hereinafter Standard Chartered Press Release].

18. Claudio Gatti & John Eligon, *Iranian Dealings Lead to a Fine for Credit Suisse*, N.Y. TIMES, Dec. 16, 2009, at B1 (reporting that Credit Suisse violated sanctions by assisting Iran funnel hundreds of millions of dollars through American banks and engaging in smaller transactions with Syria, Sudan, Burma, and Libya, but Credit Suisse only paid a civil fine of \$536 million).

19. Samuel Rubinfeld, *RBS, DOJ to End Deferred-Prosecution Agreement Over ABN Amro*, WALL ST. J. CORRUPTION CURRENTS BLOG (Dec. 28, 2011), <http://blogs.wsj.com/corruption-currents/2011/12/28/rbs-doj-to-end-deferred-prosecution-agreement-over-abn-amro/> (noting that Royal Bank of Scotland agreed to forfeit \$500 million and admit that ABN Amro, one of its acquired banks, assisted Iran, Cuba, Libya, and Sudan to move more than \$3.2 billion in high-risk transactions that flowed through its New York branch).

20. Lloyds Group hid the source of billions of dollars that passed through its United States branch offices, handling at least \$300 million of Iranian transfers and \$20 million of Sudanese transfers which might have been used to finance Iran's nuclear program and buy a large amount of tungsten, an ingredient in producing long-range missiles. See Vikas Bajaj & John Eligon, *Iran Moved Billions via U.S. Banks*, N.Y. TIMES, Jan. 10, 2009, at B1.

21. ING transferred \$1.6 billion to Iran, Sudan, Cuba, and other sanctioned countries, but only received a \$536 million fine, or thirty-three percent of the total transactions. See Karen Freifeld, *ING to Pay \$619 Million of Cuba, Iran Sanctions*, REUTERS (Jun. 12, 2012), <http://www.reuters.com/article/2012/06/12/us-ing-sanctions-idUSBRE85B12120120612>.

22. Press Release, U.S. Dep't of Justice, Former ABN Amro Bank N.V. Agrees to Forfeit \$500 (May 10, 2010), <http://www.justice.gov/opa/pr/2010/May/10-crm-548.html> (ABN AMRO, now the Royal Bank of Scotland, was charged with defrauding the United States by facilitating the movement of illegal money by stripping information from transactions, thereby violating the International Emergency Economic Powers Act).

23. Andrew Keshner, *HSBC Agrees to \$1.9B Penalty in Money-Laundering Probe*, N.Y. L. J. (Dec. 12, 2012), available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202581158679&HSBC_Agrees_to_19B_Penalty_in_MoneyLaundering_Probe&slreturn=20130201000939.

sanctions.²⁴ Most recently, as part of its settlement with the Department of Justice, HSBC agreed to pay \$1.9 billion and improve its compliance measures.²⁵ However, these banks have not been under the typical scrutiny that would accompany corporate transgressions—namely, arrest and prosecution.²⁶ Instead, deferred prosecution agreements typically allow a bank to avoid a criminal conviction as long as the bank promises to follow the terms of the agreements.²⁷ As a result, the bank will not be under the scrutiny of the Federal Deposit Insurance Corporation, which has the power to revoke a bank's insurance for "engaging in unsafe or unsound practices in conducting the business of depository institution."²⁸ The crux of deferred prosecution hinges on the corporation's willingness to "cooperate" with the government investigation in order to receive the privilege of avoiding criminal prosecution.

On the surface, deferred prosecution agreements guard against the harmful consequences of criminally charging a defendant while properly punishing those who have willfully engaged in illegal activities. Those who are in the wrong are able to avoid the reputation of criminal liability and serious collateral consequences of such a conviction.²⁹ Proponents allege that the terms of deferred prosecution agreements encourage future compliance while providing an avenue for restitution through enormous monetary fines. Likewise, banks are incentivized to abide by the sanctions.³⁰ Agreements typically include an admission of violations accompanied by a significant monetary penalty and a promise of future compliance.³¹ The prolonged use of deferred prosecution raises questions of whether banks have sufficient incentive to comply with laws if they are not being criminally charged.

But by avoiding alleged severe collateral consequences of indictment and conviction, corporations are more likely to engage in illegal transactions, knowing that their punishment will be reduced to a monetary penalty that is worth a fraction of potential profits. For example, Standard Chartered's Iranian transactions totaled an astounding figure of \$250 billion, yet it was fined just 2.5% of that sum.³² Despite its

24. ECONOMIST, *supra* note 4.

25. Peter J. Henning, *In Bank Settlements, Fines but No Accountability*, N.Y. TIMES DEALBOOK (Dec. 12, 2012), <http://dealbook.nytimes.com/2012/12/12/in-bank-settlements-big-fines-but-no-accountability>.

26. *Id.*

27. See Lawrence D. Finder, Ryan D. McConnell & Scott L. Mitchell, *Betting the Corporation: Compliance or Defiance?*, 27 CORP. COUNSEL REV. 2 (2009).

28. Henning, *supra* note 25.

29. See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1867 (2005).

30. Standard Chartered Press Release, *supra* note 17.

31. Henning, *supra* note 25.

32. Zarroli, *supra* note 12. Cf. Erika Eichelberger, *Elizabeth Warren Slams Federal Regulators Over Bank Money Laundering*, MOTHER JONES (Mar. 7, 2013, 5:45 P.M.), <http://www.motherjones.com/mojo/2013/03/elizabeth-warren-senate-banking-committee-hearing-money-laundering> (International bank HSBC was fined \$1.9 billion for laundering \$881 million to Mexican drug traffickers).

transgression, neither the bank nor any individual banker has been criminally held responsible.³³ Are the consequences of criminally charging bank executives as severe as proponents might suggest, culminating in massive lay-offs or decreased share value?³⁴ Should prosecutors be given virtually unfettered power in deciding how proactive they must be in charging corporations, what conditions a corporation must satisfy in order to avoid being charged, and which corporations deserve, *ex ante*, the compliance measures?

Deferred prosecution agreements promote the epidemic of banks knowingly and consistently violating economic sanctions, creating an anathema to our fundamental system of justice. Deference to these agreements breeds disrespect for an impartial judicial system and generates a dual system of justice that favors large financial institutions.³⁵ While individual criminals are sent to jail for selling small amounts of prohibited drugs to sanctioned countries, banks and their managers are paying a mere fine for laundering billions of dollars to drug cartels.³⁶

Further, applying these agreements in the corporate context encourages corporations and their supervisors to flout international sanctions without fear of reparation or further punishment. Individuals then sacrifice American national security interests for pure profit. Deferred prosecution agreements' ramifications, such as abandoning fairness in favor of procedural ease, eschewing principles of law, and endorsing a double standard of justice by treating corporations and individuals differently, outweigh the small possibility of corporate disintegration. Finally, the biggest danger in relying on deferred prosecutions is the agreements' susceptibility to morphing into arbitrary enforcement. Prosecutors have wide discretion in using these agreements, even after years of undetected wrongdoing. Then, not only will corporations lack the incentive to obey economic sanctions because the risk of criminal prosecution is small for institutions that are "too big to

33. Tiffany Kary & Greg Farrell, *HSBC in Settlement Talks With U.S. Over Money Laundering*, BLOOMBERG NEWS (Aug. 24, 2012), <http://www.bloomberg.com/news/2012-08-24/hsbc-in-settlement-talks-with-u-s-over-money-laundering.html>.

34. After the New York State Department of Financial Services issued an official order alleging that Standard Chartered conspired with the Government of Iran, its shares fell twenty-four percent. *See generally* Bruce Zagaris, *New York Bank Regulator Accuses British Bank of Violating Iranian Sanctions for Almost Ten Years and Bank Settles*, 28 INT'L ENFORCEMENT L. REP. 383 (Oct. 2012).

35. One criminal defense attorney recognized that there is a "double standard" for corporations and individuals under deferred prosecution agreements, but the standard ought to exist to protect the corporation, a "legal fiction" that cannot "go to jail." *See Crime Without Conviction: The Rise of Deferred Prosecution and Non Prosecution Agreements*, Corp. Crime Rep. (Russell Mokhiber ed., Dec. 28, 2005), available at <http://corporate.crimereporter.com/deferredreport.htm>.

36. Senator Elizabeth Warren (D-MA) recently questioned HSBC's deferred prosecutions during a Senate Banking Committee hearing. She noted:

If you're caught with an ounce of cocaine, the chances are good you're going to jail But evidently, if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night—every single individual associated with this—and I just think that's fundamentally wrong.

See Eichelberger, *supra* note 32.

fail,” but the banks’ quick dismissal also places the United States at a huge security risk.³⁷ Such a designation renders the banks’ activities less dangerous than they actually are; despite repeated successes in enabling drug running and terrorist financing, banks, whether individually or on the corporate level, will have little incentive to stop their profitable and illegal activities.

This Note contends that Iranian sanctions are undermined by the continued use of deferred prosecution agreements. Deferred prosecutions should be limited as a prosecutorial tool to the traditional realm of juvenile and drug offenders. Part I discusses the recent history and legal standard for Iranian sanctions, specifically observing the breadth of recent legislation aimed to stem financial transactions with Iran. Part II addresses the problems with deferred prosecution agreements, comparing the traditional use of deferred prosecution to its increased applicability to corporate crime. Then, Part III looks at the judicial oversight of deferred prosecution agreements as a means of deterring money laundering, contrasting the traditional use in criminal cases with the Department of Justice’s current approach towards corporate entities. Part IV underscores the litany of consequences of overuse of deferred prosecution agreements, from violating principles of justice to encouraging prosecutorial overreach. Part V concludes with policy recommendations, including deferred prosecution substitutes and better mechanisms for enforcement.

I. LEGAL AUTHORITY FOR IRANIAN SANCTIONS

Economic sanctions against Iran were passed with the intention of pressuring and punishing a regime whose actions tremendously conflicted with U.S. interest. The historical events that preceded the sanctions unfolded in a dramatic and consequential manner. Created as a way to give the President additional regulatory powers to address national security threats, Congress passed the International Emergency Economic Powers Act (IEEPA) in 1977. IEEPA authorizes the President to declare the existence of “any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States” that originates “in whole or substantial part outside the United States.”³⁸ In particular, the President may block transactions and freeze the assets of the threatening state.³⁹ IEEPA became the legal foundation upon which the President enacted laws to deal effectively with international threats.

37. For example, in the context of Iranian sanctions, many of the funds that are laundered could be used to support rogue states’ nuclear weapon development. See Jessica Silver-Greenberg, *Standard Chartered Agrees to Settle Iran Money Transfer Claims*, N.Y. TIMES DEALBOOK (Dec. 10, 2012), <http://dealbook.nytimes.com/2012/12/10/standard-chartered-agrees-to-settle-iran-money-transfer-claims/>; Ben Protess & Jessica Silver-Greenberg, *HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES, Dec. 10, 2012, at A1.

38. International Emergency Economic Powers Act, 50 U.S.C. § 1701(a) (2012).

39. International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(B) (2012).

IEEPA's passage allowed the United States to respond affirmatively and quickly to subsequent volatile events. In 1979, fifty-two Americans were taken hostage in Iran.⁴⁰ The situation quickly escalated into an international crisis, leading President Carter to freeze Iranian government assets in the United States.⁴¹ In 1984, the United States designated Iran as a supporter of international terrorism. Subsequently, agencies implemented numerous sanctions against Iran.⁴² The economic impact on Iran was significant: As a result of the sanction, the United States controlled \$12 billion of Iranian assets, the biggest blocking of assets in U.S. history.

IEEPA is perhaps the most effective and influential piece of legislation on the multilateral containment of Iran and is one that utilizes economic sanctions in response to a variety of national security concerns. Under IEEPA, the President has the authority to issue executive orders to block certain business transactions or freeze assets in response to any threats to national security, foreign policy, or the economy.⁴³ Executive orders that range from barring U.S. investment in Iran's energy sector⁴⁴ to freezing assets of and barring U.S. transactions with entities that support international terrorism⁴⁵ have been brought under this Act.

In terms of remedies, IEEPA provides for civil liability for violations of U.S. sanctions law on a strict liability basis.⁴⁶ Penalties that are accorded with noncompliance of sanctions laws include fines and, in the case of willful noncompliance, imprisonment.⁴⁷ The Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury administers and enforces these sanctions pursuant to U.S. foreign policy and national security goals, focusing on those parties that willingly engage in transactions with or on behalf of sanctioned parties.⁴⁸ This office also has the power to designate an individual or organization as a Specially Designated Terrorist (SDT), allowing it to freeze their assets and subjecting them to potential criminal or civil liability. IEEPA's

40. Robert Carswell, *Economic Sanctions and the Iran Experience*, 60 FOREIGN AFF., 229, 247 (1981). Iran released the hostages fourteen months later.

41. *Id.* at 249.

42. U.S. GOV'T ACCOUNTABILITY OFFICE, *IRAN SANCTIONS: IMPACT GOOD OR BAD?* viii (2008). First, the Treasury oversaw a ban on U.S. trade and investment. Second, foreign parties were sanctioned against engaging in proliferation and terrorism-related activities with Iran. Finally, the Treasury and State Departments were given power to use sanctions to freeze targeted parties' access, and reduce their assets, to the U.S. financial system.

43. International Emergency Economic Powers Act, 50 U.S.C. § 1701 (2012).

44. Exec. Order No. 13059, 62 Fed. Reg. 44,531 (Aug. 19, 1997).

45. Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). For a general discussion of how the UN Security Council devised and implemented a global economic sanctions regime to freeze economic resources of individuals and entities who support acts of terrorism, see Jimmy Gurulé, *The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding*, 41 CASE W. RES. J. INT'L L. 19 (2009).

46. Alex Lakatos & Jan Blöchliger, *The Extraterritorial Reach of U.S. Anti-Terrorism Laws*, 14 ELEC. BANKING L. & COM. REP. 1, 5 (2010).

47. 50 U.S.C. § 1705 (2007).

48. Lakatos & Blöchliger, *supra* note 46, at 5.

range of powers has allowed the government to impede specifically the wide range of options that fund international terrorism.

IEEPA's effectiveness would not exist without its broad jurisdictional reach. Two provisions support its jurisdiction.⁴⁹ First, all U.S. citizens and residents must comply with U.S. sanctions laws. Expatriate employees, visiting staff members, and contractors performing services in non-U.S. offices are all considered "residents."⁵⁰ Second, parties that "cause a violation" of any regulation or prohibited act issued under IEEPA are subject to the same penalties and violations as those who "violate, attempt to violate" or "conspire to violate."⁵¹ Most importantly, non-U.S. institutions must provide particular care to not contravene IEEPA regulations. Any party *not directly* covered by OFAC regulations that causes a party covered by OFAC regulations to violate such regulations, whether willingly or unwittingly, is subject to IEEPA penalties. Thus, given the complexities of foreign financial institutions, foreign banks that cause their U.S.-based branch to violate OFAC prohibitions are subject to punishment. Criminal penalties include imprisonment for up to twenty years.⁵²

Further, IEEPA is successful at promulgating the goals of U.S. sanctions programs. Mainly, the United States seeks to mitigate supporting international terrorists, and OFAC requires branches of foreign banks to block and report "all property within their possession or control" in which sanctioned nations, individuals, and entities have an interest.⁵³ Extraterritorial overreach includes "interests" such as foreign assets held by U.S. citizens. In one case, the First Circuit barred an engineering firm's attempt to recover payment for services rendered in connection with Iranian electricity projects.⁵⁴ There, the court cited IEEPA's "sweeping and unqualified" language to encompass all "interests" that U.S. citizens may have in Iranian assets.⁵⁵ Moreover, parties are not excluded from IEEPA just because their co-conspirators do not fall within the territorial jurisdiction of the United States. If at least some physical component of their property, whether it is computer equipment or actual cash, is stored in the United States, a defendant may still be liable for conspiring to defraud the United States.⁵⁶ As long as the Secretary of State affords proper notice that an individual or entity will

49. 50 U.S.C. § 1705(a) (2012).

50. *Id.*

51. *Id.*

52. 31 C.F.R. § 543.701(a)(2) (2011).

53. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

54. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 808 (1st Cir. 1981).

55. *Id.* at 807.

56. *See, e.g., United States v. McKeeve*, 131 F.3d 1, 11 (1st Cir. 1997). This approach is consistent with IEEPA's procedural framework, which expressly confers on the President the power to prohibit commercial transactions with certain foreign nations "with respect to any property . . . subject to the jurisdiction of the United States." *See also* 50 U.S.C. § 1702(a)(1) (2012).

be designated as a foreign terrorist organization, due process requirements are satisfied.⁵⁷

Additional uses of executive authority under IEEPA have gone similarly unquestioned and declared a constitutional delegation of legislative authority to the Executive. According to this argument, IEEPA is consistent with Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President categorizes as a threat to national security interests.⁵⁸ Also, because IEEPA has enumerated standards for the President to follow if she wants to proscribe conduct, IEEPA is a constitutional grant of authority by Congress to the President to marshal, transfer, and freeze Iranian assets.⁵⁹ The statute "meaningfully constrains" Presidential discretion, for the President must find an "unusual and extraordinary threat to the national security, foreign policy, or economy of the United States" originating on foreign soil had reached "national emergency" proportions before invoking IEEPA.⁶⁰ As such, when a defendant who enters into agreements with a country from which "unusual and extraordinary" threats have emanated,⁶¹ he can expect to be prosecuted and subsequently imprisoned for engaging in transactions "concerning property in which an enemy has an economic interest."⁶² Courts have further held that the engineer's wish to be compensated for his assets was "ab initio subordinate to the President's IEEPA powers."⁶³ As such, the President may take measures that he deems appropriate to halt further support of countries whose interests and actions may be contrary to safety of the country.

Over time, the rationale behind the sanctions evolved from disciplining Iran for its role in the hostage crisis to acting as both a symbolic and practical defiance to Iran's government policies. The country's opposition to the U.S. role in Middle East negotiations, support for Hezbollah and Hamas, acquisition of nuclear and ballistic weapons, encouragement of international terrorism, and general hostility towards the United States gave additional reasons for promoting and legislating the sanctions.⁶⁴ Undoubtedly, though many thought that

57. Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (discussing also that notice of such designation does not require the Treasury Department to disclose classified information to be presented *in camera* and *ex parte* to the court).

58. United States v. Arch Trading Co., 987 F.2d 1087, 1093–94 (4th Cir. 1993).

59. Unidyne Corp. v. Gov't of Iran, 512 F.Supp. 705, 709 (E.D. Va. 1981).

60. United States v. Amirnazmi, 645 F.3d 564, 572 (3d Cir. 2011). See also Islamic American Relief Agency v. Unidentified FBI Agents, 394 F.Supp.2d 34 (D.D.C. 2005) (noting that after the President made a finding of a state of national emergency to invoke any IEEPA provision, any challenge based on IEEPA must be to the determination that an "unusual and extraordinary threat" exists).

61. *Amirnazmi*, 645 F.3d at 580 n.25. Congress has also not considered the termination of the "national emergency" status with respect to Iran.

62. *Id.* at 584.

63. Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 808 (1st Cir. 1981).

64. HOSSEIN ASKARI ET AL., ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY 70 (2003).

the sanctions had great “effectiveness,” there has not been a significant change in the regime as to quell completely Iran’s use of state funds to support activities opposed by the United States; nor have the sanctions highly impacted Iran’s economy.⁶⁵ However, the sanctions were accompanied by restrictions on financing, reducing U.S.-Iranian trade in goods and services.⁶⁶ As such, the sanctions have hindered Iran’s ability to fund its acquisition of prohibited items and terrorism-related activities.⁶⁷ Most importantly, the sanctions hinder Iran’s ability to contract with U.S. institutions, eliminating its access to the financial system in order to support proliferation and terrorism activity.⁶⁸ Yet what marginal effects the sanctions have had on the Iranian economy have been outweighed by the symbolic and political externalities that they have imposed on Iran. Iran has been strictly *persona non grata* on the world stage, retaining none of the legitimacy that other countries have with the international community.

While their economic effects may be dubious, there is no doubt that sanctions on Iran have been politically popular, leading every president and Congress since 1979 to tout its values. In 1987, President Reagan’s executive order that prohibited nearly all imports from Iran followed Congress’s successful House and Senate resolutions calling a ban for Iranian imports.⁶⁹ Following a period of relative executive silence concerning Iranian issues, the Iran-Iraq Arms Nonproliferation Act of 1992 significantly bolstered restrictions on U.S. exports to Iran, adding mandatory sanctions to any foreign government that aided Iran’s acquisition of “chemical, biological, nuclear, or destabilizing numbers and types of advanced conventional weapons.”⁷⁰ Moreover, the Act ended any economic aid, adding threatening measures against firms and individuals that targeted Iranian programs.⁷¹ Finally, the Clinton administration’s aggressive containment policy is indicated by the President’s executive order imposing across-the-board, unilateral trade and investment sanctions on Iran.⁷²

Other legislation has attempted to quell international threats and hostile states. The 1996 Iran Sanctions Act (ISA) was a harbinger of increasingly worrying steps that Iran had taken towards gaining nuclear arms. The ISA focused on a larger, multilateral effort to curb Iran’s extra-territorial reach by mandating U.S. penalties against foreign companies that conduct certain business with Iran’s energy sector.⁷³ In 2002, the alarming rise of Iran’s nuclear program led the George W. Bush administration to take multiple approaches in limiting the country’s strategic capabilities. Not only did President Bush deploy unique

65. HOSSEIN ASKARI ET AL., CASE STUDIES OF US ECONOMIC SANCTIONS 171 (2003).

66. *Id.*

67. UNITED STATES GOV’T ACCT. OFF., IRAN SANCTIONS: GOOD OR BAD? 3 (2008).

68. *Id.*

69. RICHARD N. HAASS, ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY 85 (1998).

70. Vahe Petrossian, *Iran Back in the Firing Line*, MIDDLE E. ECON. DIG., Dec. 4, 1992.

71. HAASS, *supra* note 69, at 86.

72. Puneet Talwar, *Iran in the Balance*, FOREIGN AFF., Jul.–Aug. 2001, at 58, 61.

73. KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 3 (2011).

rhetorical devices to condemn Iran strongly on an international stage,⁷⁴ he also levied diplomatic sanctions as an attempt to foster dialogue on specific regional issues.⁷⁵ In contrast, the Obama administration's approach towards Iran has concentrated on directly negotiating with Iran on the nuclear issue. The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2012 (CISADA) amended the Iran Sanctions Act to curtail petroleum-related activities as well as restrict international banking relationships.⁷⁶ The financial provisions of CISADA prohibit entities owned or controlled by U.S. financial institutions from engaging in or benefiting Iran's Islamic Revolutionary Guard Corps.⁷⁷ The financial prohibitions strived to protect the U.S. government's domestic financial system from Iran's illicit activities, especially those that involved individuals and entities that engaged in dangerous and sanctionable activities.⁷⁸

Further legislation gives authority to the executive branch to control and subdue activity that engages sanctioned countries. The Comprehensive Iran Sanctions, Accountability and Divestment Act of 2012 (CISADA) expanded the Iran Sanctions Act significantly in order to incentivize foreign governments from contracting with Iran, requiring all companies that enter into U.S. government contracts to certify that they are not violating any provision of the Iran Sanctions Act.⁷⁹ The extent of CISADA's jurisdictional reach has yet to be tested,⁸⁰ but its ambitious intentions are clear—CISADA targets broad categories of activities, from selling equipment to Iran to enhance or expand its oil

74. President Bush defined Iran as an enemy of the United States, categorizing the country as part of the "axis of evil" with Iraq and North Korea. See KENNETH KATZMAN, CONG. RESEARCH SERV., RL32048, IRAN: U.S. CONCERNS AND POLICY RESPONSES 58 (2012).

75. *Id.* at 58–59. For the first time since 1979, the Bush administration committed to direct dialogue with Iran. In light of the U.S.'s engagement in Iraq, the administration was perhaps wary of antagonizing Iran to a point that would jeopardize U.S. troops deployed in the region.

76. KATZMAN, *supra* note 74, at 6. Arguably, CISADA has heightened the punishment that was originally imposed by the Iran Sanctions Act by requiring at least three out of the nine possible sanctions be imposed on a violator.

77. U.S. DEP'T OF TREASURY, *CISADA—The New U.S. Sanctions on Iran* 2 (2012), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/CISADA_english.pdf.

78. *Id.* at 1–2. Such sanctionable activities include, but are not limited to, developing weapons of mass destruction (WMD), providing terrorist organizations with support, and engaging in money laundering by the Central Bank of Iran. *Id.*

79. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (2010). The Iran Sanctions Act consists of various "triggers" that would cause a firm to be sanctioned under ISA's provisions. For example, companies that make more than a \$20 million investment in Iran's energy sector or sell Iran weapons of mass destruction technology would trigger sanctions. American firms, in comparison, are already banned from investing in Iran.

80. Though it is unclear whether foreign companies with few or no business dealings in the U.S. would successfully preclude U.S. courts from asserting jurisdiction, the executive branch's power to maintain a "sweeping sanctions" regime is unquestioned. Congress "expanded, deepened, and formalized the sanctions in a comprehensive legislative effort to target Iran" through both IEEPA and CISADA. See *United States v. Amirnazmi*, 645 F.3d 564, 579–80 (3d Cir. 2011).

refineries to discontinuing U.S. importation of Iranian delicacies.⁸¹ As a result, new foreign banks that conduct transactions with Iranian entities are prevented from opening U.S. accounts.⁸² Companies' fear that their engagements would jeopardize any potential new U.S. business opportunities may severely limit Iran's access to the international financial system.

Finally, as a measure to sever Iran's ties completely from the U.S. banking system, the Treasury Department enacted a series of provisions in 2008. Though the Department stopped short of designating any bank as a "money laundering entity" for Iran-related transactions, it barred U.S. banks from handling any indirect transactions from Iranian clients, typically called "U-turn transactions."⁸³ "U-turn transactions" previously permitted U.S. banks to process payments from Iranian entities, as long as the transactions were initiated offshore and passed through the U.S. for "dollar clearing."⁸⁴ After these transactions were banned, U.S. clearing banks were required to look at wire-transfer messages and freeze transferred assets that originated from any Iranian bank.⁸⁵

However, banks, such as Standard Chartered, were accused of "wire stripping," or removing codes from money transfers that would have identified Iranian clients.⁸⁶ Therefore, U.S. banks did not perform due diligence in determining that they were not financing terrorism. In theory, the breadth of legislation, executive orders, and administrative actions should have prevented any companies from even considering transacting business with Iran. In reality a lack of stringent enforcement and prosecutorial willingness to overlook criminality ultimately resulted in political pressure without actual results.

II. HISTORY AND STANDARD OF DEFERRED PROSECUTION AGREEMENTS

Contrary to the modern use of deferred prosecution for large financial institutions, the traditional use of these agreements is rooted in small measures to protect vulnerable persons in society. Prosecutors historically utilized deferred prosecutions as a way to impede future criminal conduct without saddling defendants with the scarlet mark of a criminal charge.⁸⁷ For that reason, deferred prosecutions were mostly used in the context of juvenile defendants and non-serious offenses, or

81. KATZMAN, *supra* note 74, at 9–28.

82. KATZMAN, *supra* note 75, at 73.

83. KATZMAN, *supra* note 74, at 32.

84. Kara Scannell & Tom Braithwaite, *Size of StanChart problem U-turn dependent*, FIN. TIMES (Aug. 7, 2012), <http://www.ft.com/cms/s/0/3cecd128-e0af-11e1-8d0f-001144feab49a.html#axzz2NdueSds3>.

85. BBC, *Q&A: Standard Chartered Iran Allegations*, BBC NEWS, Dec. 10, 2012, available at <http://www.bbc.co.uk/news/business-19157426>.

86. Scannell & Braithwaite, *supra* note 84.

87. The Chicago Boys' Court in 1914 used deferred prosecutions to avoid branding juvenile offenders as criminals. The Court noted that, "Having been found guilty, he is stamped with a criminal record." See JAMES A. INCIARDI ET. AL., *DRUG CONTROL AND THE COURTS* 25 (1996) (quoting Judge Braude, who spoke at lengths about the implications of criminalizing juvenile conduct); Greenblum, *supra* note 29, at 1866.

those whose criminal actions were presumably an outlier rather than an indicator of future patterns of behavior.⁸⁸ In order to be granted a deferral, the offender first makes an admission of guilt and waives the right to a speedy trial. Then, in exchange for being criminally charged, the offender commits to rehabilitation and when necessary, pays restitution to the victims. The offender then agrees to abide by terms that the prosecution sets, which always include a deferral period. At the end of the period, if the offender has followed the terms, the prosecutor may dismiss the indictment.⁸⁹ If the agreement has been breached, the offender's previous admission can be used to impeach the offender at a later trial.

By utilizing deferred prosecution agreements in their original capacity, the prosecutor fulfills three goals of the criminal justice system.⁹⁰ This use is limited to non-serious offenses, such as first-time misdemeanor charges, like possession of marijuana or retail theft, especially if committed by a juvenile.⁹¹ Deferred prosecutions agreements were never intended to manage corporate crime. The offender, first, has a chance to rehabilitate into society without suffering the collateral consequences of a felony conviction (such as exclusion from federal financial education aid, voting, government benefits, public housing, and jury service). Because rehabilitation is community-based, typically including counseling, training, and job placement,⁹² the offender has extra support to help her avoid criminal activity.

Second, the offender is deterred from further participation in criminal conduct by the agreement's straightforward procedure and the fear of certain prosecution if the agreement is materially breached. When the prosecution sets a deferral period that marks the time in which offender must follow the agreement's terms, the time limit acts as the light at the end of the tunnel, giving offenders a well-lit road to freedom.

Third, insofar as retribution is concerned, because offenses that trigger deferred prosecution are relatively minor and usually non-violent, the offender "pays" for his crimes by adhering to the terms of the agreement for a period of time (typically a year). Such terms may include frequent check-ins with a law enforcement officer or the prose-

88. Candance Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 4 (2008); Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, 30 CHAMPION 12, 13 (Oct. 2006).

89. Greenblum, *supra* note 29, at 1864.

90. At least, it is hoped that the agreement fulfills the primary purpose of "facilitating the offender's rehabilitation and reintegration into the law-abiding community and the restoration of crime victims and communities, while avoiding the stigma and collateral consequences associated with criminal charges and convictions." MODEL PENAL CODE: SENTENCING § 6.02A (Discussion Draft No. 4 2012).

91. THE UNITED STATES ATTORNEYS' MANUAL § 9-22.000 (2011). The Manual makes clear that a major objective of pretrial diversion, which includes deferred prosecution agreements, is to "save prosecutive and judicial resources for concentration on major cases."

92. Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974).

ctor's office.⁹³ As a practical matter, deferred prosecution avoids a full criminal trial and preserves scarce prosecutorial and judicial resources.⁹⁴ In sum, the advantages of using deferred prosecution in the context of individuals are two-fold: the offenders are spared from suffering a lifetime of stigma "associated with processing and the resultant change in self-image, associations, and behavior associated with the negative societal reaction" attached to a criminal charge, and the justice system benefits from a reduced docket congestion.⁹⁵

The similarities between corporate deferrals and traditional criminal deferrals mainly revolve around procedure. First, a prosecutor may choose to file a criminal charge against the corporation, and the claim will be dropped if the company complies with the agreement's terms.⁹⁶ Then, the company typically chooses to enter a probationary period in which it agrees to enact substantial internal reforms and to cooperate with the government.⁹⁷ This process is similar to an individual offender entering into rehabilitation after agreeing to abide by the agreement's terms. The overarching purpose of a deferred prosecution is to facilitate an offender's rehabilitation and re-integration into the community while holding him accountable for his criminal conduct.⁹⁸

In contrast, a corporation's restitution is more extensive than what is required of an individual. The corporation first makes substantial monetary payments to the government and submits to federal monitoring. If the corporation has not materially breached any terms of the agreement and fulfilled its obligation, the prosecutor may dismiss the charges. Akin to individual offenders' agreements, if the corporation does not follow the agreement, the government may declare a breach and proceed with criminal charges against the corporation. These

93. Cf. Ben Poston & Daniel Bice, *Some cases in deferred prosecution process raise eyebrows*, Milwaukee-Wisconsin J. Sentinel, Dec. 12, 2010, available at <http://www.jsonline.com/watchdog/watchdogreports/111733029.html>. Even deferred prosecution use for individuals has its drawbacks because of the agreements' wide deference to prosecutorial discretion. In Milwaukee, prosecutors gave deferred prosecutions to those charged with driving while drunk, felony sexual assault, and high-volume drug trafficking. *Id.*

94. Greenblum, *supra* note 29, at 1866.

95. GENNARO F. VITO & DEBORAH G. WILSON, *THE AMERICAN JUVENILE JUSTICE SYSTEM* 22 (1985).

96. See MODEL PENAL CODE: SENTENCING § 6.02A (Discussion Draft No. 4 2012) (suggesting that the prosecutor "may decline to charge or withdraw charges already filed without prejudice" before agreeing to enter into a deferred prosecution agreement with the accused); Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1056 (2006) ("The filing of a criminal charge is not a prerequisite to a deferred prosecution agreement. . ."). Cf. *United States v. Biomet Orthopedics Inc.*, No. 07-8133, 2007 WL 2964201, at *2 (D.N.J. Sept. 28, 2007) (where the prosecution chose to file a criminal complaint before filing a deferred prosecution agreement).

97. Ideally, by agreeing to cooperate, the corporation would provide enough information to the government so prosecutors could build a case against individual employees. However, such cases seem to have increasingly become a rarity. See Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008).

98. MODEL PENAL CODE: SENTENCING § 6.02A.

agreements often include provisions in which the government is listed as the sole decider as to whether a breach has occurred.⁹⁹ As a result, the question of whether a company actually breached the agreement is not subject to an objective trier-of-fact's judgment, but posed to the government, which might have an ancillary interest in protecting the status of "successful" deferred prosecution agreements.

However, if the government incorrectly determined that a breach occurred, the agreement is not subject to review.¹⁰⁰ This predicament is unlike most plea-bargaining scenarios, where if the government thinks the defendant breached the agreement, it should "move to withdraw from the agreement" and leave the decision of whether the defendant's actions do constitute a breach to the judge.¹⁰¹ But perhaps the hardest part of deferred prosecutions to reconcile is the fact that government officials, in the corporate context, have made not made clear how they will properly ensure banks' compliance with agreements.¹⁰² Actual implementation is left to the wayside, despite prosecutors' best intentions.

A recent spike in deferred prosecution agreements has solidified the path towards using them in the context of corporate criminal liability. The first variation came in 1992, when the government charged Salomon Brothers for securities fraud violations. The company agreed to comply with the government's request to reform, including restructuring its management, paying \$280 million in fines and forfeiture and undertaking other internal measures to avoid future misconduct.¹⁰³

99. See, e.g., Deferred Prosecution Agreement between United States Department of Justice, Criminal Division, Fraud Section, and Micrus Corporation and its Swiss subsidiary Micrus S.A. (Feb. 28, 2005), available at <http://www.justice.gov/archive/dag/cftf/chargingdocs/micrusagreement.pdf> [hereinafter Micrus Deferred Prosecution Agreement]; Deferred Prosecution Agreement, United States v. Banco Popular de Puerto Rico, (D.P.R.) available at <http://www.corporatecrimereporter.com/documents/banco.pdf> [hereinafter Banco Deferred Prosecution Agreement] ("Should the United States determine during the term of this Agreement that BANCO POPULAR has committed any federal crime commenced subsequent to the date of this Agreement, BANCO POPULAR shall, in the sole discretion of the United States, thereafter be subject to prosecution for any federal crimes of which the United States has knowledge."); Deferred Prosecution Agreement, United States v. Standard Chartered Bank, No. 12 - 00262 (Dec. 10, 2012 D.D.C.) available at <http://www.corporatecrimereporter.com/wp-content/uploads/2012/12/Standard-Chartered-Bank-DPA.pdf> [hereinafter Standard Chartered Deferred Prosecution Agreement].

100. Candance Zierdt & Ellen S. Podgor, *Back Against the Wall*, 23 CRIM. JUST. 34, 36 (2008).

101. United States v. Gomez, 271 F.3d 779, 782 (8th Cir. 2001).

102. Cf. *Crime Without Conviction: The Rise of Deferred Prosecution and Non Prosecution Agreements*, CORP. CRIME REP., Dec. 28, 2005, <http://corporatecrimereporter.com/deferredreport.htm>. American Online, Inc., after entering into a deferred agreement with the government for aiding and abetting securities fraud, was monitored by an independent consultant hired by the Department of Justice. It is unclear whether the company properly complied with agreement following the monitor process.

103. See Spivack & Raman, *supra* note 97, at 163; Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter \$290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992); Press Release, U.S. Dep't of Justice, Judge Approves \$27.8 Million Justice Department Antitrust Settlement with Salomon Brothers, Largest Civil Antitrust Penalty (Sept. 14, 1992).

Then, two years later, Prudential Securities entered into a similar agreement with the U.S. Attorney's office.¹⁰⁴ The prosecuting attorney at that time labeled the deferred prosecution "a very special situation" and not something she "was likely to do again."¹⁰⁵ Yet ten years later, deferred prosecutions had become the rule rather than the exception. The agreements transformed into a "tool that prosecutors have" and a "vehicle" in which to "show results."¹⁰⁶ Prosecutors were increasingly comfortable with using deferred prosecutions as a regular tool to stave off long trials.

The true advent of deferred prosecution agreements arrived after the Holder Memorandum and Filip Memorandum were released. In 1999, then-Deputy Attorney General Eric Holder wrote formal guidelines for organizational prosecutions.¹⁰⁷ The memorandum stressed that corporations should be subjected to the same "[v]igorous enforcement of criminal laws against corporate wrongdoers" as individuals are when they commit crimes; prosecutors should not hesitate to charge "individual directors, officers, employees, or shareholders."¹⁰⁸ Then, in 2003, another memorandum was released that examined considerations that cropped up after the Enron scandal.¹⁰⁹ The Thompson

104. Prudential was charged with securities fraud by misleading investors about the rates of return and the tax status of the investments. See F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. LAW. 121, 125–26 (1997). The difference in this case was that the government submitted a pre-trial diversion agreement instead of a deferred prosecution agreement.

105. But see *Interview with Mary Jo White*, 19 CORP. CRIME REP. 48 (2005), available at <http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm> [hereinafter *Interview with Mary Jo White*]. The prosecutor at the time was Mary Jo White, former U.S. Attorney of the Southern District of New York and President Obama's nominee as Chair of the Securities and Exchange Commission.

106. *Id.*

107. Spivack & Raman, *supra* note 97, at 164. Currently, Eric Holder resides as the Attorney General and has also been criticized for his relaxed approach to corporations. In response to his orders to the Department of Housing and Urban Development (HUD) to stop investigating claims that Beazer Homes USA, a home builder, engaged in mortgage fraud, the inspector general of HUD wrote a letter that lamented, "As a law enforcement official for over 40 years . . . I have never witnessed a like action in any of my varied dealings." See Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, N.Y. TIMES, July 7, 2011, at A1.

108. Memorandum from Eric H. Holder, Jr., U.S. Deputy Assistant Att'y Gen., to All Component Heads and United States Attorneys (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.pdf> [hereinafter Holder Memorandum]. Later, when Holder became the Attorney General under President Obama's first administration, he was also roundly criticized for his policy of offering deferred prosecution for large financial institutions that break federal criminal laws. See OFFICE OF OREGON SENATOR JEFF MERKLEY, *Merkley Blasts 'Too Big to Jail' Policy for Lawbreaking Banks* (Dec. 13, 2012), <http://www.merkley.senate.gov/newsroom/press/release/?id=42a606e4-7c45-42ed-8348-c77c508f9281> (in which Oregon Senator Jeff Merkley opined that the Justice Department "appears to have firmly set the precedent that no bank, bank employee, or bank executive can be prosecuted even for serious criminal actions if that bank is a large, systematically important financial institution.").

109. Former Enron Corporation President Jeffrey Skilling received 24 years and four months in prison for numerous counts of fraud and conspiracy after Enron collapsed into bankruptcy in 2001. John R. Emshwiller, *Skilling Gets 24 Years in Prison*, WALL ST. J., Oct. 24, 2006, at C1.

Memorandum emphasized that its revisions focused on “increas[ing] emphasis on and scrutiny of the *authenticity* of the corporation’s cooperation” with government investigations.¹¹⁰ Most importantly, the memorandum made clear that cooperators would be rewarded for voluntary disclosure.

The Thompson Memorandum’s emphasis on avoiding collateral consequences of prosecution was most likely a reactionary response influenced by the Arthur Andersen case.¹¹¹ The Memorandum stressed that prosecutors should take into account a multitude of factors before pursuing corporate criminal convictions, including the “substantial consequences to a corporation’s officers, directors, employees, and shareholders”; “non-penal sanctions that may accompany a conviction”; and the “pervasiveness of the criminal conduct and the adequacy of the corporation’s compliance programs” to avoid impact on innocent third parties.¹¹²

In the Arthur Anderson case, prosecutors were forced to employ criminal charges on the former Chicago accounting giant for its integral role in the Enron scandal. As Enron began the slow march to bankruptcy, the company ordered Andersen employees to destroy all audit material, except for basic “work papers.”¹¹³ Employees then shredded tons of documents over several weeks, destroying evidence that was subject to the subpoena against Enron. An indictment and subsequent prosecution contributed to the company’s disintegration, even though reports indicated that over 95% of Arthur Andersen’s employees had no connection with the wrongdoing that led to the company’s collapse.¹¹⁴ Tens of thousands of people were subsequently unemployed, and the firm’s collapse changed the accounting industry irreparably.¹¹⁵ In short, Arthur Andersen received the corporate

110. Memorandum from Larry D. Thompson, Dep. Att’y Gen., U.S. Dep’t of Jus., to Heads of Dep’t Components and U.S. Att’ys, U.S. Dep’t of Justice (2003) [hereinafter Thompson Memorandum].

111. Indeed, as a result of the Arthur Andersen collapse, the Department of Justice turned towards using deferred prosecution agreements and non-prosecution agreements (NPAs). In NPAs, the government agrees to not file criminal charges against the defendant in exchange for a term of compliance. The discussion of NPAs is beyond the scope of this Note, but for a general discussion of NPA, see John N. Gallo & Daniel M. Greenfield, *The Corporate Criminal Defendant’s Illusory Right to Trial: A Proposal for Reform*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 525, 536 (2014).

112. *Id.*

113. Daniel Kadlec, *Enron: Who’s Accountable?*, TIME (Jan. 13, 2002), <http://www.time.com/time/magazine/article/0,9171,1001636,00.html>.

114. McPhee, *supra* note 88, at 12. It could also be argued that Arthur Andersen’s refusal to accept responsibility led to criminal charges and implement structural reforms. Later, the Supreme Court eventually overturned Andersen’s conviction, *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005), but the company was completely disintegrated by that time.

115. The “Big 5” accounting firms were turned into the “Big 4.” See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006).

“death sentence” for its impropriety.¹¹⁶ It is not a surprise, then, that the Thompson Memorandum would advise prosecutors to avoid a company’s total collapse by advocating softer prosecution methods.¹¹⁷

Finally, a third memorandum emerged from the Department of Justice and endeavored to add guidance to prosecutorial decision. The 2008 Filip Memorandum expanded on previous memoranda by adding a ninth factor for prosecutors’ consideration. The memorandum rejected any prosecutorial analysis that would equivocate cooperation with the corporation with waiving the corporation’s attorney-client privilege or attorney work product protection.¹¹⁸ Further, the memorandum, while urging the prosecutors to “aggressively enforce the law” and “promote fair outcomes for the American people,” acknowledged that, by the same principle, prosecutors could consider “collateral consequences of a corporate criminal conviction or indictment” in determining whether to actually charge the corporation with a criminal offense.¹¹⁹ However, it is not clear to what extent any prosecution could affect corporations, and the “collateral consequences” that follow are unsubstantiated by any Department of Justice memoranda. Banks, in their haste to avoid prosecutions, have offered no empirical evidence for their claims.¹²⁰ It is difficult to fathom the process for which this decision to avoid prosecution was determined, as it is unclear that prosecutors, the Department of Justice, or any other government official looked at economic studies to determine the “collateral consequences.” At best, the public is asked to take the government’s word of these effects.

Thus, the memoranda seem to encourage prosecutors to deliberate the potential economic catastrophes that could be provoked by a criminal conviction. A corporation’s alleged financial well-being was paramount to any wrongs that the corporation committed. The final guidelines are as follows:

116. Scott Horsley, *Enron and the Fall of Arthur Andersen* (National Public Radio broadcast May 26, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5435092>.

117. The additional need to avoid debarment (which prevents the company from doing business with the government) and exclusion from government contracts (especially for companies that depend on government contracts for survival) also incentivizes prosecutors to use deferred prosecution agreements over traditional criminal and civil litigation. See Zierdt & Podgor, *supra* note 88, at 5.

118. Memorandum from Mark R. Filip, Dep. Att’y Gen., U.S. Dep’t of Jus, to Heads of Dep’t Components and U.S. Atty’s, U.S. Dep’t of Justice, (2008), available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf> [hereinafter Filip Memorandum]. The Filip Memorandum was incorporated directly into the *United States Attorneys’ Manual* as USAM 9-28.100, *et seq.*

119. *Id.* at 1, 17.

120. When questioned, nominee for the Securities and Exchange Commission Mary Jo White, said that “prosecutors should consider [collateral consequences of a criminal indictment] before proceeding.” Similarly, Attorney General Eric Holder has said that the size of some institutions “has an inhibiting impact” on the department’s ability to bring certain cases. Jason M. Breslow, *SEC Nominee Signals Cautious Approach to Prosecuting Banks*, PUB. BROAD. SERV. (March 13, 2013), <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/sec-nominee-signals-cautious-approach-to-prosecuting-banks/>.

1. the nature and seriousness of the offense, including the risk of harm to the public;
2. the pervasiveness of the wrongdoing within the corporation;
3. the corporation's history of similar conduct;
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
5. the existence and adequacy of the corporation's compliance program;
6. the corporation's remedial actions;
7. the collateral consequences, including disproportionate harm to shareholders and others;
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions.¹²¹

The added ninth factor, the adequacy of remedies, underscores the importance of providing just compensation for those who were harmed by corporate conduct. Finally, the Filip Memorandum emphasizes that charging a corporation with minor misconduct is appropriate when there has been pervasive wrongdoing and many employees joined in the wrongdoing.¹²² On the surface, the Holder, Thompson, and Filip Memoranda administered instructions for prosecutors uneasy about using deferred prosecution as a procedure to avoid actual criminal charges. In reality, it is debatable how much prosecutors actually followed and implemented the memorandum's suggestions, considering the considerable leeway that they later gave corporations.

Should prosecutors find the memoranda devoid or lacking in unambiguous guidelines, there are other sources of legal authority that succinctly comment on the procedures and standards for deferred prosecution agreements. These sources include the U.S. Attorneys' Manual and U.S. Department of Justice Criminal Resource Manual.¹²³ The U.S. Attorneys' Manual suggests that prosecution should be declined when there is "[n]o substantial federal interest which would be served by prosecution; [t]he person is subject to effective prosecution in another jurisdiction; or [t]here exists an adequate non-criminal alterna-

121. Filip Memorandum, *supra* note 118, at 3–4.

122. *Id.* at 5–6. The memorandum goes on to stress that the theory of *respondere superior* would be inappropriate to use when wrongdoing was conducted by a single employee.

123. As internal policy manuals, the U.S. Attorneys' Manual and U.S. Department of Justice Criminal Resource Manual are not entitled to *Chevron* deference because "interpretations contained in policy statements, agency manuals, and enforcement guidelines' . . . are beyond the *Chevron* pale." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)). Instead, the manuals are given weight based upon their power to persuade. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also Stephen M. DeGenaro, Note, *Why Should We Care About an Agency's Special Insight?*, 89 NOTRE DAME L. REV. 909, 923–26 (2013) (discussing how the courts should account for the fact that an agency has "special insight" into interpretations of regulations the agency drafts).

tive to prosecution.”¹²⁴ The comments further note that no prosecution should be initiated against any person unless the prosecutor believes that “an unbiased trier of fact” would probably find the person guilty.¹²⁵ Moreover, the prosecutor should consider “the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests.”¹²⁶ The Department of Justice Criminal Resource manual, in comparison, discusses the Pre-Trial Diversion Program, which seeks to “prevent future criminal activity” and also conserve judicial resources through diverting offenders from “traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service.”¹²⁷ The difference between a pre-trial diversion and deferred prosecution is negligible.¹²⁸ However, the U.S. Attorneys’ Manual recommends that pre-trial diversion only be used in cases concerning individual defendants, not corporations.¹²⁹ Further, any offense that is related to “national security or foreign affairs” may not be eligible for pre-trial diversion consideration.¹³⁰

Prosecutors attribute their decision to eschew traditional criminal remedies in favor of deferred prosecutions to a substantial number of legal sources. It can be argued that the idea of prosecutorial discretion presents itself as an attractive, simple, and elegant solution in face of messy procedural hurdles. But though it is true that prosecutors can “avoid the black-and-white decision of indicting”¹³¹ by choosing other avenues for pursuing crimes, the freedom to choose whatever mechanism suits the prosecutor’s favor can be easily abused without a systematic and comprehensive check on prosecutorial discretion. Most crucially, when national security interests are at risk, the idea that prosecutors receive unrestricted deference to their choices seems incongru-

124. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220 (2002).

125. *Id.*

126. *Id.* at § 9-27.250.

127. *Id.* at § 9-22.000. During a pre-trial diversion, offenders must plead guilty to their offenses. Offenders are then diverted at the “pre-charge stage,” and those who successfully complete the program will either not be charged or have the charges against them dismissed. Those who fail the pre-trial diversion program because of a breach of the agreement are subsequently prosecuted for their original offense.

128. Programs that involve deferral or diversion of usual prosecutorial or adjudicative processes are known as deferred prosecution, pretrial diversion, pretrial intervention, or any combination thereof. See 21A AM. JUR. 2D CRIMINAL LAW § 866 (2012). Participation in this program is purely voluntary, and the participant must waive her right to a speedy trial and applicable statute of limitations. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-22.200 (2002).

129. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-22.100 (2011). However, during the Prudential Securities debacle, the U.S. Attorneys’ Office explained that a pre-trial diversion agreement would impose the same sanctions as those which would have resulted from a criminal conviction. As a result, the government submitted a pre-trial diversion agreement that applied to the corporation but not individuals. See Warin & Schwartz, *supra* note 104, at 126.

130. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-22.100 (2011).

131. Bloomberg News, *U.S. Deferring Cases Against Firms Promising to Behave*, CHI. TRIB., Jan. 5, 2005, Sec. 3, at 2.

ous to the idea that punishment should, in the end, preclude offenders from thinking that they can “escape prosecution merely by returning the spoils of his/her crime.”¹³² Therefore, deferred prosecution agreements should be utilized not with eager zeal, but careful scrutiny and a modicum of hesitation.

III. DEFERRED PROSECUTIONS AND ECONOMIC SANCTIONS: DANGERS AND POLITICAL ERRORS

Deferred prosecutions have been well established in the corporate context. However, until 2008, they had never been applied in cases involving international economic sanctions. The upending consequences of the financial crisis signaled to financial institutions, especially ones that were questioned for their role in the mortgage crisis, that the Justice Department’s blessing of deferred prosecutions was “an important step away from the more aggressive prosecutorial practices seen in some cases under their predecessors.”¹³³ Allowing the use of such prosecutions in this context is inconsistent with the principles of criminal legal theory and any current legislation that governs international economic sanctions.

In the course of litigation against non-financial corporations, courts have repeatedly held that corporate defendants that had a relationship with the Iranian government or Iranian entities were criminally liable for violating economic sanctions with Iran. When a company violates regulations that prohibit shipments of equipment to Iran, the company will typically be convicted under the Iranian Embargo, which was issued as an Executive Order under the authority of the International Emergency Economic Powers Act (IEEPA).¹³⁴ Courts have not been persuaded by various defenses attempting to justify breaching the embargo, including accusations that executive orders were vague because they failed to provide adequate or fair notice and complaints that companies must fulfill contractual obligations under the doctrine of necessity because foreign workers and families in Iran depend on the shipment of goods.¹³⁵ In fact, the embargo casts a wide net over a multitude of incidents, discouraging companies from even indirectly transacting with sanctioned states. Even companies that merely facilitate joint ventures to sanctioned states are held liable for facilitating, financing, or approving transactions between non-affiliated third parties and embargoed countries. In one instance, a U.S. company that underwrote transactions was charged with violating sanctions, as its original Chinese proceeds eventually trickled to the parent com-

132. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.230 (2002).

133. *Second Circuit Affirms SDNY Ruling that Prosecutors Denied Defendants’ Sixth Amendment Rights*; DOJ Issues new Principles for Prosecution of Business Organizations, SULLIVAN & CROMWELL (Sept. 3, 2008), <http://graphics8.nytimes.com/packages/pdf/business/20110629bank/sullivan.pdf>.

134. *United States v. Hescorp*, 801 F.2d 70, 72–73 (2d Cir. 1986).

135. *Id.* at 72.

pany's operations in Sudan.¹³⁶ This strict interpretation of IEEPA is not common, as courts regularly defer to the public policy reasons behind the sanctions. For courts, justifications that "aim to induce Iran's government to reduce the threat that . . . Iran poses to United States interests" are enough to quash any hints of impropriety.¹³⁷

Similarly, prosecutors have not shied away from levying harsh sentences against non-financial corporations that violate economic sanctions. In particular, the government does not have any reluctance in pursuing claims against corporations when the companies at fault are those that export tangible products to sanctioned countries. While the heads of corporations have been sentenced to a few years of imprisonment, the corporations themselves have been sentenced to millions of dollars in criminal monetary fines and probation. Those that have been indicted have diverse functions, from aviation manufacturers¹³⁸ to telecommunications designers.¹³⁹ Punishment has ranged from civil penalties¹⁴⁰ to corporate probation.¹⁴¹ For example, when one corporation was found liable for transferring illegal exports, the government has sought more than \$100 million in fines and additionally levied criminal convictions against the company for its export violations.¹⁴² There, the U.S. Attorney intended to "send a clear message that illegally exporting [the United States'] most important secrets will be prosecuted and punished."¹⁴³ Perhaps the government's varied and vacillating leniency towards banks compared to non-financial institutions stems from the easily established connection that can be made between products and subsequent consequences: a company's products that are

136. Erica Fung, *Regulatory Competition in International Capital Markets: Evidence from China in 2004–2005*, 3 N.Y.U. J.L. & Bus. 243, 265, 272 (2006).

137. *Bassidji v. Goe*, 413 F.3d 928, 934–35 (9th Cir. 2005).

138. Balli Aviation Ltd. was criminally charged in 2010 for conspiring to export Boeing aircrafts to Iran. The company paid a \$2 million criminal fine and was on corporate probation for five years. The corporation and its subsidiary, Balli Group PLC, also has to submit results from an independent audit of its export compliance to OFAC for the next five years. U.S. BUREAU OF INDUS. & SEC., DON'T LET THIS HAPPEN TO YOU: AN INTRODUCTION TO U.S. EXPORT CONTROL LAW 9–10 (2010), available at http://www.bis.doc.gov/complianceandenforcement/dontletthishappentoyou_2010.pdf.

139. Allied Telesis Labs, a company that designed telecommunication equipment and systems, pled guilty to conspiring with another corporation to trade with Iran and eventually execute a \$95 million contract with Iranian telecommunications companies. The company was fined \$500,000 in criminal charges and placed on probation for two years. *Id.* at 29.

140. Thermon Manufacturing Company's charged subsidiaries voluntarily disclosed violations and cooperated fully with the government's investigation into their exports of heat tracing equipment to Iran, Syria, and Libya. In return, the subsidiaries agreed to pay a total of \$176,000 in combined civil penalties. *Id.* at 28.

141. Proclad International Pipelines was sentenced for conspiring to illegally export nickel alloyed pipes to Iran. Proclad paid a \$100,000 administrative penalty, a criminal fine of \$100,000, and was sentenced to five years of corporate probation. *Id.* at 36.

142. *U.S. Defense Contractor to Pay \$100 Million Penalty and Face Criminal Conviction for Export Violations*, Export Controls and Economic Sanctions Update (Sidley Austin LLP), Apr. 17, 2007, at 1–2. ITT, a leading manufacturer of military night vision, admitted to transferring products in violation of the U.S. Arms Export Control Act.

143. *Id.*

sold and used in Iran are easily connected to Iran's derived benefits.¹⁴⁴ Whereas one could argue that the sheer volume of money that flows in and out of global financial institutions only peripherally benefits an invested country, proponents of prosecutorial leniency have a much harder argument against criminally punishing a company when its products are directly given to the Iranian government or companies.

Similarly, private individuals that initiate deals with Iran are given little leeway when they violate economic sanctions. The extent to which individuals are liable for their transfers to sanctioned countries depends on the scope of a court's IEEPA reading. Predominantly, courts apply IEEPA broadly and prohibit transfer of funds on behalf of another entity, whether or not the transfer included a fee for the defendant's service.¹⁴⁵ When courts find that individuals willingly disobey the sanctions, the criminal charges brought under IEEPA are sustained.¹⁴⁶ Individuals who knew that transactions were taking place with sanctioned countries were roundly condemned.¹⁴⁷ In one instance, a Taiwan national was sentenced to forty-two months in prison for conspiring to export missile components from the United States to Iran.¹⁴⁸ There, the defendant communicated and coordinated with co-

144. As part of its transgressions, Balli Aviation, Ltd., entered into lease agreements that permitted an Iranian airline to use its aircrafts for flights in and out of Iran. See Office of Public Affairs, *U.K. Firm Pleads Guilty to Illegally Exporting Boeing 747 Aircraft to Iran*, DEPT. OF JUSTICE (Feb. 5, 2010), <http://www.justice.gov/opa/pr/2010/February/10-nsd-131.html>.

145. See 50 U.S.C. §§ 1702, 1705(h) (2012); *United States v. Banki*, 685 F.3d 99 (2d Cir. 2012) (where a defendant was found guilty of IEEPA violations because the transfer of funds on behalf of another constituted a "service" prohibited by IEEPA's regulations banning the exportation or sale from the United States to Iran, even if the service was not performed for a fee).

146. *United States v. Hescorp*, 801 F.2d 70, 77 (2d Cir. 1986) ("[A] requirement of willfulness makes a vagueness challenge especially difficult to sustain."). See also *United States v. Chitron Elec. Co. Ltd.*, 668 F. Supp. 2d 298 (D. Mass. 2009) (in which a manager of a U.S.-based electronics company was convicted of conspiring to violate U.S. export laws and illegally exporting items and subsequently sentenced to eleven months imprisonment, three years of supervised release, and a monetary fine).

147. See *United States v. Harb*, 111 F.3d 130 (4th Cir. 1997) (holding that ample evidence established that the defendant knew selling to Iraq violated the embargo accompanying the gulf War, as evidenced by the great lengths to which he went to conceal that the users of his exports were in Iraq); *United States v. Reyes*, 270 F.3d 1158 (7th Cir. 2001) (finding that the defendant's conviction of exporting military aircraft parts destined for Iran was supported by evidence that the defendant received documents indicating that the parts were forwarded to Iran and thus willfully violated IEEPA); *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2006) (holding that evidence showing the defendant faxed documents that showed his investments in a corporation were made by a designated terrorist's wife was sufficient to support a conviction under IEEPA).

148. BUREAU OF INDUS. & SEC., TAIWAN EXPORTER IS SENTENCED TO THREE AND A HALF YEARS FOR CONSPIRING TO EXPORT MISSILE COMPONENTS FROM THE U.S. TO IRAN (August 30, 2010), available at <http://www.bis.doc.gov/news/2010/doj08302010.htm>; See also U.S. BUREAU OF INDUS. & SEC., *supra* note 138, at 34, available at http://www.bis.doc.gov/complianceandenforcement/dontletthishappentoyou_2010.pdf. (Traian Bujduveanu pled guilty to conspiracy to violate IEEPA and the Arms Export Control Act in connection with his role in trying to export civilian and military aircraft parts to Iran. Bujduveanu was sentenced to thirty-five months in prison and three years of supervised release).

conspirators around the world to facilitate the transfer of exports, taking requests for U.S.-manufactured goods from Iranian customers. That the goods were not actually transferred was not enough to mitigate the defendant's criminal charges.¹⁴⁹ Further, in another case, the defendant's actions were a microcosm of financial institutions' actions: Anvari-Hamedani, doctor of Iranian descent practicing in the United States, transferred funds from his U.S. account to intermediary banks, which then forwarded the funds to an Iranian bank.¹⁵⁰ The defendant's motions to dismiss the indictment for violating IEEPA and federal money laundering laws were denied and he was found guilty of 38 felony counts, resulting in a forfeiture of \$650,000, a fine of \$500,000, and 60 days of imprisonment.¹⁵¹ In sum, the government's consistency in imposing criminal charges against individuals suggests its proclivity for criminally prosecuting those who personally transfer money to sanctioned countries. Yet this enthusiasm for prosecuting individuals is starkly contrasted with its unwillingness to enter into anything but deferred prosecution agreements with large financial institutions.

Presently, the gulf between purported penalties and actual punishment is ever-widening. As recent as May 2012, President Barack Obama signed an executive order authorizing the U.S. Treasury Department to publicly identify anyone and any business in "evasive and deceptive activities" and ban them from participating in the U.S. financial system.¹⁵² Yet in December 2012, Standard Chartered Bank entered into a deferred prosecution agreement with the U.S. government, receiving no criminal penalties or hindrances for continuing business in the United States.¹⁵³ This penalty is inconsistent with the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010 (CISADA), which warns that financial institutions that open or maintain accounts prohibited by section 104(c) could be subject to criminal penalties up to \$1,000,000, and individuals can be imprisoned for up to twenty

149. In fact, an individual conspiring to breach Iranian sanctions are given just as much punishment as those who actually violate the sanction. For example, Reece Roth, a professor at the University of Tennessee, engaged in a conspiracy to transmit export controlled technical data to Chinese and Iranian nationals. Roth was sentenced to forty-eight months in prison and two years of supervised release. See Fung, *supra* note 136, at 25.

150. *United States v. Anvari-Hamedani*, 378 F. Supp. 2d 821, 825 (N.D. Ohio 2005). The indictment also alleged that the defendant engaged in "hawala" transfers, which involve payment to an individual "hawaladar," who then arranges for funds located in another country to be paid to the designated Iranian recipient.

151. In addition to these penalties, the State Medical Board of Ohio also stripped Anvari-Hamedani of his medical license. See Letter from Mohammad Anvari-Hamedani to Anvari-Hamedani (Aug. 8, 2007), available at <http://med.ohio.gov/formala/35032727.pdf>.

152. *Obama Stiffens Penalties for Violating Iran, Syria Sanctions*, RADIO FREE EUROPE RADIO LIBERTY (May 2, 2012), http://www.rferl.org/content/obama_stiffens_penalties_for_violating_iran_syria_sanctions/24567288.html. When the executive order was released, the then-Under Secretary for Terrorism and Financial Intelligence supplemented the decision by stating, "Whoever tries to evade our sanctions does so at the expense of the people of Syria and Iran, and they will be held accountable."

153. Deferred Prosecution Agreement, *United States v. Standard Chartered Bank*, No. 1:12-cr-00262 (D.D.C. Dec. 10, 2012).

years.¹⁵⁴ As such, prosecutors seem to have deviated from their previous inclination of levying heavy criminal fines and prison time for sanctions violations, whether for an individual or corporation. The question remains: What drove this prosecutorial shift?

Wary prosecutors may not treat banks and non-financial companies and individuals consistently, but there are other ways to remedy an unfair punishment scheme. At the very least, if prosecutors are uneasy about pressing criminal charges, the Office of Foreign Asset Control (OFAC) could adhere to the enforcement of previous cases and prescribe monetary penalties proportional to the amount of profit that the company earned from sanctions violations. New York company Essie Cosmetics, for instance, formerly employed an individual corporate officer that knowingly sold and exported nail care products to Iranian distributors. The company settled for \$450,000 with the federal prosecutors, but the total transaction was valued at \$33,299.¹⁵⁵ In essence, while a small cosmetics corporation and its officer were fined approximately 1351% of its total transactions, a large financial institution was only punished for a tiny fraction of its distributions. To add insult to injury, OFAC seemed to enact such a high penalty because Essie Cosmetics failed to self-report the violation, and there were vague “efforts to evade sanctions.”¹⁵⁶

Perhaps prosecutors’ fear of pursuing criminal charges stems from the inevitable collateral consequences that follow. If the appropriate criminal sanctions were applied, the Federal Deposit Insurance Corporation may revoke a bank’s insurance for engaging “in unsafe or unsound practices in conducting the business of the depository institution.”¹⁵⁷ As a result, banks will be unable to conduct business, will be cut off from pension funds, and ultimately will cost its charter to operate in the United States.¹⁵⁸ The bank’s reputation would most likely be tarnished, as investors would be wary about placing money or trust in the institution.

Prosecutors’ avoidance of criminal sanctions as applied to financial institutions is manifested in the manner in which the Department of Justice approached Standard Chartered compared to Essie Cosmetics. Standard Chartered enacted an elaborate system of computer process-

154. Section 104(c) requires that the Secretary of Treasury to issue regulations to prohibit the opening or maintenance of a pay-through account by a foreign financial institution that knowingly engages in “prohibited activities,” including but not limited to Iran’s efforts to acquire or develop weapons of mass destruction; Iran’s efforts to support for organizations designated as foreign terrorist organizations or for acts of international terrorism; the activities of a person subject to UN Security Council financial sanctions. See Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, §104(c), 124 Stat. 1312 (2010).

155. *Essie Cosmetics Ltd. And Individual Corporate Officer Settle Iranian Transactions Regulations Allegations*, OFAC Recent Actions, DEP’T OF THE TREASURY (Apr. 10, 2012), http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/04102012_essie.pdf.

156. *Id.*

157. 12 U.S.C. § 1818(a) (2012).

158. Prottess & Silver-Greenberg, *supra* note 37, at A4.

ing codes to conceal each transaction payment's Iranian origin.¹⁵⁹ In that case, the bank acknowledged that its total transactions with Iranian clients amounted to approximately \$241.9 billion, and the banks met \$6.8 billion in pre-tax profits, yet Standard Chartered only paid \$674 million as a civil penalty.¹⁶⁰ Standard Chartered's profits are typical of what a bank would earn through transactions, though the percentage varies by the type of deal being sought.¹⁶¹ The government's inconsistency in affording banks and manufacturers the same legal treatment underscores its preference (and perhaps fear) for interfering with banks' success.

IV. CONSEQUENCES OF DPA ABUSE: FROM PROSECUTION TO SHAREHOLDERS

The amount of prosecutorial discretion is troubling in cases of deferred prosecution agreements, given that prosecutors have the sole power to decide whether to prosecute a corporation without any judicial oversight. Because prosecutorial discretion resides in the power of the executive branch, as "the decision to prosecute is particularly ill-suited to judicial review,"¹⁶² the prosecutors have wide discretion to assist the President in his duty to "take Care that the Laws be faithfully executed."¹⁶³ Therefore, prosecutors have broad agency in how they want to exercise their power within the American system of adjudication.¹⁶⁴

In deferred prosecutions, the judicial role is similarly minimal. Deferred prosecutions are negotiated and implemented exclusively by the prosecutor, giving them the ability to apply sanctions without criminally charging the offender. The criticisms that accompany this limited role are twofold. First, there has been no proof offered that giving cor-

159. Standard Chartered started providing banking services to Iranian clients in 1993. The Central Bank of Iran asked Standard Chartered to remove any reference to Iran in Society for Worldwide Interbank Financial Telecommunications (SWIFT) messages, which is the international system to transmit payment messages to financial institutions. Though external legal counsel warned that the New York office needed to obtain full transactional information about the payments in order to decide whether they should freeze the assets, the system of wire-transfer checks were continuously and systematically abused. See Standard Chartered Bank Deferred Prosecution Agreement, *supra* note 152, at Attachment A 7-15; BBC, *Q&A: Standard Chartered Iran Allegations*, BBC NEWS, Dec. 10, 2012, available at <http://www.bbc.co.uk/news/business-19157426>.

160. The total paid fine was only .28 percent of the total transactions Standard Charter made with Iranian entities. See Deferred Prosecution Agreement, *supra* note 153, at 2, Attachment A 17.

161. Typically, in global equities, the total gross "spread" or profit of the deal ranges from three to seven percent of the transaction. However, the number varies across equity, investment grade debt, and high yield bonds. Telephone Interview with Spencer Fertig, former Equity Capital Markets Analyst, Morgan Stanley (Mar. 20, 2013).

162. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

163. U.S. CONST. art. II, § 3.

164. James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1554-55 (1981) ("[P]rosecutors are not held to anything remotely like what due process would require if they were engaged in an acknowledged rather than a hidden system of adjudication.").

porations a deferral option actually reduces recidivism rates.¹⁶⁵ Second, deferral minimizes the judicial role in interfering with prosecution's decision. Though the U.S. Code advises prosecutors to submit deferred agreements for court approval,¹⁶⁶ there is no case law that suggests judges have turned down the use of such agreements,¹⁶⁷ and many agreements are not submitted at all to courts.¹⁶⁸ Also, with the exception of nebulous factors from various Justice Department memoranda, prosecutors do not have adequate guidelines to help them reach a conclusion of who or what would be an appropriate entity to criminally charge. Courts, likewise, must presume that prosecutors have "properly discharged their official duties" in deciding whether to indict or enter an agreement.¹⁶⁹

Prosecutors' wide range of discretion virtually guarantees that institutions remain unpunished for corporate individuals' decisions. Their "tremendous leverage" is tantamount to "life and death powers over people and companies."¹⁷⁰ Normally, under the theory of respondeat superior, when the individual commits the crime within the scope of employment and with the intent to benefit the corporation, the corporation may still be held criminally liable.¹⁷¹ The entity is punished based on the public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of participating in the business that gave rise to the conduct.¹⁷² Then, because corporate criminal conduct also violates

165. Since 2008, Swiss banking giant, UBS, has entered into several deferred prosecution agreements and settlements for money laundering, tax evasion, conspiracy to rig municipal bond derivatives, and defrauding customers who purchased auction-rate securities. Still, the bank maintains a heavy record of recidivism, apologizing as recently as 2012 for manipulating interest rates in the Libor-rate setting scandal. See James B. Stewart, *For UBS, a Record of Averting Prosecution*, N.Y. TIMES, Jul. 20, 2012, at B1. Cf. WASH. STATE INST. FOR PUB. POL'Y, DEFERRED PROSECUTION OF DUI CASES IN WASHINGTON STATE: EVALUATING THE IMPACT ON RECIDIVISM 10 (Aug. 2007), <http://www.wsipp.wa.gov/rptfiles/07-08-1901.pdf> (noting that DUI defendants received deferred prosecution recidivated at lower rates than defendants who pled guilty or were convicted of a DUI).

166. See 18 U.S.C. § 3161(h)(2) (2012). The time to file an indictment is tolled during the "period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."

167. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 922 (2007).

168. See Warin & Schwartz, *supra* note 104, at 122 n.4.

169. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

170. *But see Interview with Mary Jo White, supra* note 105.

171. See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972) (where the corporation, a hotel, was held liable under the Sherman Act for acts of the hotel's purchasing agent, who threatened a supplier with loss of the hotel's business unless the supplier paid a trade association's assessment).

172. See *C.B. ex rel. L.B. v. Evangelical Lutheran Church in America*, 726 N.W.2d 127, 135 (Minn. Ct. App. 2007); *Unruh-Haxton v. Regents of University of California*, 162 Cal. App. 4th 343 (Cal. Ct. App. 2008) (holding that public policies under respondeat superior include preventing the recurrence of tortious conduct; giving greater assurance of compensation for the victim; and ensuring that the victim's losses will be borne by those who benefit from the enterprise that gave rise to the injury).

civil and administrative regulatory processes, corporate individuals are also charged. Corporate liability allows prosecutors to bring criminal charges while providing incentives for managers to patrol ranking officers and employers, creating a law-abiding corporate culture.¹⁷³ Critics of the respondeat superior theory allege that individuals have no showing of direct personal involvement necessary to convict a manager for company violations.¹⁷⁴ With deferred prosecutions, both the individual and corporation escape criminal liability.

However, the public policy reason of protecting the public has repeatedly trumped fears of judicial overreach. Allegedly, the public is innocent and does not have the resources to protect itself, while the corporate official has the authority and responsibility to correct and prevent violations.¹⁷⁵ Where corporate individuals have defied sanctions by making decisions at the highest levels to willingly violate sanctions, they have not been charged with a crime.¹⁷⁶ Actual intent to violate the sanctions can be imputed on these individuals, as they repeatedly hid transactions originating from Iran by eliminating identification data and employing sophisticated techniques to evade computer recognition.¹⁷⁷ By such actions, these individuals violated the IEEPA by “willfully commit[ing]” an unlawful act, which calls for a potential fine of \$1,000,000 and imprisonment lasting up to twenty years.¹⁷⁸ That individuals are completely immune from such punishment is irreconcilable with both the statute’s terms and the theory of corporate agent liability.

Finally, the principles of criminal justice are disregarded by the continuous use of deferred prosecution agreements. Prosecutors may justify deferred prosecutions in the corporate context by pointing to

173. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, § 9-28.200(A) (“Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.”).

174. These critics typically focus on public welfare legislation that does not require a showing of direct personal involvement to convict a manager of company violations. Courts also have upheld these statutes, holding that they do not require a finding of intent or negligence to support convictions. See Margaret Graham Tebo, *Guilty by Reason of Title*, 86 A.B.A. J. 44, 45 (May 2000).

175. See, e.g., *United States v. Park*, 421 U.S. 658 (1975) (where the corporate manager was punished because he as in a position to prevent or correct the offense, had a responsibility to do so, and failed to comply).

176. In the case of British bank Lloyds TSB Group, several employees manipulated the bank’s central system orders by hiding identifying information of transactions originating in Iran. None of the employees were charged with a crime under the Justice Department’s deferred prosecution agreement. See Bajaj & Eligon, *supra* note 20.

177. When ING Bank moved more than a billion dollars through banks to Cuba, Iran, and other countries from the early 1990s to 2007, they did so partly by evading computer filters designed to prevent sanctioned entities from gaining access to the U.S. banking system. See Karen Freifeld, *ING to pay \$619 million of Cuba, Iran sanctions*, REUTERS, Jun. 12, 2012, available at <http://www.reuters.com/article/2012/06/12/us-ing-sanctions-idUSBRE85B12I20120612>.

178. 50 U.S.C. § 1705 (2012).

increased accountability as a result of agreements' close monitoring¹⁷⁹, or even a desire to avoid collateral consequences of criminal prosecution. Though these goals are understandable, the overreaching consequences shed light on the hazards of relying on deferred prosecution agreements. Collateral consequences are a non-sequitur to prosecuting individuals. Sanctions that are perpetrated by individuals are weighed against the collateral consequence of shutting down their business or individually prosecuting them, and that rationale should extend to the corporate context.¹⁸⁰ These agreements are imperfect tools for affecting widespread corporate change or compliance with sanctions, failing to instill a sense of responsibility in both the corporation and individual. Most importantly, there is no evidence that the Department of Justice or any other governmental entity has monitored financial institutions' compliance, and if they have, to what extent the monitoring has permeated the institution.

Deterrence is left by the wayside as banks conclude that the civil fines imposed as a result of their discretion are grossly underwhelming compared to both the total valued transactions and the profits they reap from making the transactions. The general deterrence principle seeks to punish the offender in order to convince the general community to forego criminal conduct in the future.¹⁸¹ Specific deterrence seeks to deter a defendant's future conduct. According to this principle, an increase in the likelihood of punishment will deter more effectively than an increase in severity. In the case of HSBC, the bank may be specifically deterred from committing future crimes—even though the bank avoided criminal charges, if the bank ran afoul of federal rules, the Justice Department has the right to resume a case against them and file criminal charges.¹⁸² One can imagine that institutions breathed a sigh of relief after finding out that their charges would be limited to civil penalties and fines—the deferred prosecution agreement essentially serves as a warning to avoid disobeying any more laws.

However, such fines are a cost of doing business. It is further unlikely that other banks will be deterred from committing the same crimes. Because the caught banks only paid one half a quarter's profit¹⁸³ in its fines and avoided a criminal indictment or guilty plea,

179. Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Speech to the New York City Bar Ass'n (Sept. 13, 2012).

180. See *United States v. Bassidji*, 413 F.3d 928, 934–35 (9th Cir. 2005); *United States v. Hescorp*, 801 F.2d 70 (2d Cir. 1986).

181. Jeremy S. Parker, *Criminal Sentencing for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 554 (1989).

182. Protes & Silver-Greenberg, *supra* note 37, at A4.

183. See, e.g., *Standard Chartered pays \$327m to settle Iran fine*, DAILY TELEGRAPH (UK) (Dec. 10, 2012), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9735083/Standard-Chartered-pays-327m-to-settle-iran-fine.html> (discussing the \$250 billion worth of transactions that Standard Chartered hid with Iran, compared to the \$327 million of fines it paid to settle the allegations, which is only 1.3% of the total transactions). In 2011, Standard Chartered set a ninth consecutive year of record net profit, reaching \$4.7 billion. See Fiona Law & Max Colchester, *Standard Chartered Profit Reaches Record \$4.75 Billion*, WALL. ST. J. (Mar. 1, 2012), <http://online.wsj.com/article/SB10001424052970204653604577252342204932220.html>.

the banks have essentially been able to continue daily operations.¹⁸⁴ The message that is being conveyed by the government, therefore, reads more like a stealth encouragement to other financial institutions to engage in continuous disregard for sanctions.¹⁸⁵ As noted, the only corporations that have been criminally indicted or pled guilty to violating sanctions in the past have been non-financial institutions. Here, the government offers banks reverse incentives—the bigger the institution and the more financial services it provides, the less it will be fined and the less likely it will be criminally prosecuted. A lack of a stringent monitoring program does not actually rehabilitate banks as much as it casts a superficial solution to correct banks' future behavior. Indeed, institutions and individuals who think that prosecutors will have a natural inclination towards deferred prosecution will be dissuaded from following proper protocol and obeying sanctions.

It is questionable whether banks will be rehabilitated because of the Department of Justice's recommendations. The principle of rehabilitation is tied closely to deterrence, but instead of securing compliance through fear of punishment, rehabilitation is used to reform the wrongdoer. Under this theory, correctional systems in place are inadequately informing the wrongdoer of its purported crimes. Though the deferred prosecution agreements have included proposed changes to banks' reporting system and implementation of a mandatory reporting system, banks are not subject to the kind of reflection and reformation that accompanies rehabilitation. The government-imposed changes on banks mostly encourage strengthening internal compliance controls and commitment to obey federal laws for a few years.¹⁸⁶ For Standard Chartered, its agreement suggested that the bank "enhance and optimize" voluntary compliance programs by increasing personnel and resources devoted to sanctions compliance, enhance its global sanction compliance policies and procedures, and design and implement improved sanctions compliance training for the staff.¹⁸⁷ On its face, these programs sound stringent and encompassing, but nowhere does the agreement suggest that OFAC, the Department of Justice, or any other governmental agency would monitor the implementation and progress of the programs to ensure full compliance. In short, these changes do not expose institutional leaders to the dire repercussions of their violations, including potentially funneling money to Iranian ter-

184. Protes & Silver-Greenberg, *supra* note 37, at A4.

185. University of Notre Dame law professor and former Undersecretary for Enforcement for the U.S. Treasury Department Jimmy Gurulé has characterized the government's actions as suggesting, "[I]f you want to engage in money laundering, make sure you're doing it within the context of your employment at the bank. . . . Do it on a very large scale, and you won't get prosecuted." See Mark Gongloff, *Obama Administration Essentially Admits That Some Banks Are Too Big to Jail, Which Is Troubling*, HUFFINGTON POST (Dec. 12, 2012, 5:04 PM), http://www.huffingtonpost.com/2012/12/11/hsbc-too-big-to-jail_n_2279439.html.

186. Deferred Prosecution Agreement, *supra* note 153, at Attachment A 7-15; see also Protes & Silver-Greenberg, *supra* note 37, at A4.

187. Protes & Silver-Greenberg, *supra* note 37.

rorist groups and arming Iran with resources to purchase or develop weapons of mass destruction.¹⁸⁸

The principle of retributivism, a backwards-looking principle that justifies punishment because of the voluntary commission of the crime, is arguably unfulfilled because banks and individuals who made the choice to willingly violate sanctions are not given punishments proportionate to their crimes. For one, the deferred prosecution agreements for the banks that have violated sanctions have not included any sort of shareholder compensation remedy. In contrast, previous agreements have given substantial payments consisting of cash in restitution, issuance of stock, and cash payments to compensate shareholders in shareholder class actions.¹⁸⁹

The continued use of deferred prosecution in the corporate context creates a dual system of justice. When banks are treated with cautious deference, prosecutors demean other corporations and individuals, contributing to a notion that their societal status and contribution are not as meaningful or important as financial institution's stature. The message to the public is simple: If you are an individual or small business owner, you will be prosecuted for violating Iranian sanctions, no matter the size or quantity of your transaction. However, if you are a bank official of a large, international bank, you will be granted prosecutorial leeway and avoid criminal sanctions altogether. This criminal justice system, therefore, fails to serve the interests of the public by arbitrarily treating a class of individuals differently than another class.

V. REMEDIES AND POLICY RECOMMENDATIONS

Practical and effective recommendations can be gradually implemented in order to improve corporate prosecutions and encourage corporate compliance. Given the scant evidence cited, consequences do not explain why the Department of Justice has failed to prosecute bank officials. Solutions must work towards deterring and punishing banks from repeatedly violating sanctions. The solutions range from building internal corporate structures with regular government oversight to curbing the use of deferred prosecutions and abandoning the use of deferred prosecutions in the corporate context altogether. In the end, however, these structural implementations must fulfill the goals of punishment. Otherwise, any consequences that banks face will be left by the wayside.

188. In fact, HSBC's Mexican operation transferred more than \$7 billion to the United States, which officials deemed to have had to be "illegal drug proceeds." Furthermore, HSBC worked with Saudi Al Rajhi bank, which has supported Al Qaeda. Protes & Silver-Greenberg, *supra* note 37.

189. See Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. COM. L. 64 (2006) (noting that Computer Associates, a corporation that faced an indictment for securities fraud and obstruction of justice in 2004, entered into a deferred prosecution agreement that included \$225 million in restitution and cash payments of \$163 million to shareholders).

If deferred prosecution is to be used at all, corporations should be forced to establish an enhanced compliance system. Here, the corporations would implement a cross-departmental monitoring system that uses an independent agency hired by the government to conduct regular checks on corporations.¹⁹⁰ This entity would operate on dual-process basis. First, the entity could make recommendations to help the corporation in complying with the agreement, initiate changes within the corporation, and observe the corporation during the time of the deferred prosecution. While the Justice Department issued a memorandum in the past to address the selection of a qualified monitor, the Morford Memo does not address the problems of implementing the monitorship.¹⁹¹ The monitor must evaluate, propose, and help establish internal controls for the corporation, but the specifics of when and how the monitoring is to take place is left to the discretion of the corporation. Second, the monitor could make additional follow-ups during the agreement's duration to ensure continued compliance. The entity would continue to make recommendations. In reality, although banks' recent deferred prosecution agreements include implementing new sanctions compliance procedures and policies, nowhere do they indicate whether these programs will be monitored, thus defying the purpose of making sure banks comply with the agreement's terms.¹⁹² As a result, the government seemingly leaves the banks alone after the agreement is signed, only stepping in after any more federal laws are violated but failing to prevent such violations before they happen.

Furthermore, in using deferred prosecution agreements, the government could be more hesitant in employing them when U.S. sanctions are ignored, following a set of strict and clear standards set by the Department of Justice. Instead of broad-based use of these agreements, they should be limited to negligent violations or used in their original capacities. For example, the Department of Justice could amend their policy manual and recommend specific standards for pursuing deferred prosecution agreement.¹⁹³ If the agreements are used at all in the corporate context, unlike the standards set forth in the Holder and Thompson memoranda, new standards would present straightforward

190. The independent status of the monitor is crucial, a monitor that is hired by the corporation could create a conflict of interest. The U.S. government could fashion a monitoring team much like the Analytical Sanctions and Monitoring Team of the U.N. Security Council. This team submits comprehensive reports to the Sanctions Committees as well as enhances the effectiveness of the anti-terrorism economic sanctions measures. See Gurulé, *supra* note 45, at 32–33.

191. Memorandum from Craig Morford, Acting Dep. Att'y Gen., U.S. Dep't of Jus., to Heads of Dep't Components and U.S. Atty's, U.S. Dep't of Justice (2008), <http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf> [hereinafter Morford Memorandum].

192. Deferred Prosecution Agreement, United States v. Standard Chartered Bank, No. 1:12-cr-00262 (D.D.C. Dec. 10, 2012).

193. For a general discussion of how the Department of Justice can amend their policy manuals in other white collar crime cases, such as money laundering cases, see Leslie A. Dickinson, Note, *Revisiting the "Merger Problem" in Money Laundering Prosecutions Post-Santos and the Fraud Enforcement and Recovery Act of 2009*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 579, 603–04 (2014).

situations in which agreements should and should not be used.¹⁹⁴ When situations trigger proper use of agreements, prosecutors could also limit them to situations “where they certainly would have indicted otherwise for all the right reasons on their part.”¹⁹⁵

Then, the policy reasons behind using deferred prosecution agreements could be used with little room for abuse: Whatever collateral consequences that proponents attach to these agreements would have to be empirically proven. For example, the defendant corporation might have the burden of proof in showing why a criminal prosecution would cause their business to fail. They would have to show a direct and causal relationship between a criminal indictment and irrevocable losses of their company.¹⁹⁶ In addition, if individuals seek clemency from criminal indictment, either they or the corporation would have to prove how much prosecuting a bank official would affect future corporate earnings, corporate stability, and daily operations. The lack of an agreement’s popularity and usage would somewhat lessen any reliance that corporations have when they willingly violate laws, thereby encouraging them to engage in across-the-board corporate compliance.

Finally, as a more dramatic measure, deferred prosecution agreements could be banned completely. To the extent that the agreements were originally intended to apply to non-serious offenders, use of deferred prosecution could be reverted back to those limits. Refusing to give corporate individuals and institutions any sort of leniency would send a strong message to those contemplating violations. In this instance, sanctioned countries would have to pass extremely difficult barriers in order to funnel money through U.S.-based banks. Banks who violate the sanctions, even once, would be charged criminally, and institutional figures would similarly be jailed for such indiscretions. There is a worry that shareholders will be penalized for activity over which they had no control, yet any sanctions “imposed in excess of the criminal profits obtained are spread among so many shareholders as to be negligible.”¹⁹⁷ By refusing to apply deferred agreements in the corporate context, corporations will have strong incentives to promote due diligence and carefully obey sanctions.

CONCLUSION

“Over the last decade, DPAs have become a mainstay of white collar criminal law enforcement.”¹⁹⁸ Such prolonged use of deferred prosecution agreements creates a dual system of justice that suggests

194. For instance, where a corporation has continuously and willfully ignored sanctions for more than a set number of years, the memorandum should highly discourage use of deferred prosecution. In addition, where the amount of transactions surpasses a price ceiling, corporations could be fined more money and punished more severely.

195. *Interview with Mary Jo White, supra* note 105.

196. To meet a high standard, corporations could submit empirical data that clearly delineates the probability of future loss of profits from imposing criminal charges.

197. Julie Rose O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 *Geo. J. Legal Ethics* 1, 35 (2002).

198. Lanny A. Breuer, *supra* note 179.

that banks are above the law, especially when banks knowingly and repeatedly violate economic sanctions meant to protect American citizens from being harmed by terrorist individuals and organizations, especially in the situation in which a nation with explicit terrorist ties and animosity towards the United States is being assisted by banks in the United States. The interest in protecting the public cannot be met when banks with offices in the United States transfer funds to sanctioned countries with known terrorist organizations.¹⁹⁹ Prosecutors surrender to banks' cries that a criminal indictment would expose them to "catastrophic reputational damage,"²⁰⁰ choosing to levy them with mere fines. Compared to prison time and heavy penalties that are usually used to discipline individuals, banks escape blame for all of their transgressions, though their exploitative behavior is no more different than tax fraud perpetrated by individuals.

Former U.S. Attorney and current Securities Exchange Commission Chair Mary Jo White once expressed concern that deferred prosecutions, the "automatic alternative" to indictment, were "becoming a deferred prosecution much too often."²⁰¹ White's wishes were futile, considering the trajectory of the Standard Chartered and other recent banks' scandals. In turn, a dangerous cycle of complacency and inequity begins. The sovereign, whose laws the corporations have violated, is rendered irrelevant. Most importantly, the system of justice upon which our ideals are founded is chipped away with every deferred prosecution granted, as corporate managers, whose choices resonate through the international sphere, hide behind the veil of their corporations and immunize themselves from criminal liability. A system of justice that is continuously undermined and desecrated becomes nothing but a shallow skeleton teetering in the wind, flailing against the tide of corruption. Such a system may not survive. Courts must be vigilant in stemming the rise of such tides. Those who have the power to punish should use their tools wisely and appropriately, holding liable a person or an institution that is responsible for the harm that has been caused.

199. In a recent case against HSBC, the government charged HSBC with violations of the Bank Secrecy Act and willfully facilitating financial transactions on behalf of sanctioned entities in violation of the International Emergency Economic Powers Act ("IEEPA"). See *United States v. HSBC Bank*, No. 12-CR-763, 2013 WL 3306161, at *1 (Jul. 1, 2013). The parties entered into a DPA, where the government agreed to dismiss the charges if HSBC complies with terms, including addressing the lack of accountability over their sanctions compliance programs. *Id.* at *2. The Court, in reviewing the DPA, approved it, saying it "retain[ed] the authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court." *Id.* at 11.

200. Farrell & Kary, *supra* note 7.

201. *Interview with Mary Jo White*, *supra* note 105.